United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.....

HAROLD SHRIER, individually and doing business under the name and style of A. Shrier & Sons Company, a registered Michigan co-partnership,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is not yet reported in the official reports. A copy of the opinion appears in the record at page 32.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 4, 1945 (R. 31). The provision which is believed to sustain the jurisdiction of this Court is Rule 11 of the Rules of Practice and Procedure (18 U.S.C.A. following Sec. 688).

STATEMENT OF THE CASE

The essential facts of the instant case have been stated in the foregoing petition to which reference is respectfully made.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court because the facts stated in the information do not state a crime against the United States, as the revised maximum price regulation No. 271, upon which said information is based, which was promulgated by the Price Administrator under the purported authority of Section 3 of the Emergency Price Control Act of 1942 (50 U.S.C.A. Appx. Sec. 901, *et seq.*) is void and unconstitutional in that:

(a) Said regulation was not issued with the prior approval of the Secretary of Agriculture and is, therefore, void under Section 3(e) and 3(f) of said Emergency Price Control Act of 1942 (50 U.S.C.A. Appx. Sec. 903(e) and (f));

(b) Said regulation is void and unconstitutional in that it was promulgated under Executive Order 9250 (Oct. 3, 1942) which provides that agricultural ceiling prices should be established by the Price Administrator and the Secretary of Agriculture jointly and upon disagreement, by the Director of the Office of Economic Stabilization; that the instant regulation was not approved by the Secretary of Agriculture and, in addition, the said Presidential Proclamation (Executive Order 9250) under which said regulation was issued is contrary to the provisions of the Emergency Price Control Act of 1942 above cited, as well as Title II—Sec. 1(b) of said Act (50 U.S.C.A. Appx. Sec. 921(b));

(c) Said regulation is void and unconstitutional in that it is approved by the War Food Administrator under the purported authority of Presidential Proclamation (Executive Orders 9328 and 9334) transferring the duties conferred upon the Secretary of Agriculture under said Act to the War Food Administrator which transfer of authority is contrary to Section 3(e) of said Emergency Price Control Act of 1942, hereinabove cited, and is also contrary to Title II, Sec. 1(b) of said Act (50 U.S.C.A. Appx. Sec. 921(b)); and

2. The Circuit Court of Appeals erred in determining that it lacked jurisdiction to declare "Regulation" No. 271, which is void on its face, unenforceable.

SUMMARY OF ARGUMENT

For the sake of brevity, reference is respectfully made to the "Reasons for Granting Certiorari" contained in the foregoing petition.

ARGUMENT

I.

"REGULATION" 271, NOT HAVING BEEN APPROVED BY THE SECRETARY OF AGRICULTURE, NEVER BECAME A REGULATION UNDER THE PRICE CONTROL ACT NOR CAN ANY ACTION BE BROUGHT FOR ITS ENFORCEMENT

It is of paramount importance that we point out at the outset, the limited effect of our attack on the "Regulation" in question. We do not seek, in these proceedings, to question the validity and constitutionality of the Emergency Price Control Act of 1942 under which this "regulation" No. 271 was purportedly promulgated. Nor do we make any contentions that would result in the weakening or overturning of the great body of Regulations promulgated under that Act. Nor will it be necessary for the Government to point out, as we anticipate it will, that emergencies begotten of the necessities of war justify the imposition of emergency legislation and powers. It is not part of our case to tilt with these invincibles.

Our issue is solely with one regulation, which, we submit, is unenforceable by the very provisions of the Price Control Act. If this regulation is found to be unenforceable, it will not weaken the Price Control Act or the body of regulations built on that Act, but will merely require that this Regulation, if it is to be enforced in the future, must be promulgated under the aegis of the Secretary of Agriculture to become effective.

Although the power to promulgate price ceilings is vested solely in the Price Administrator under the Price Control Act as to commodities other than agricultural

ones, the Price Control Act (50 U.S.C.A. Appx., Secs. 901-971) provides as to agricultural commodities, that no regulation can be promulgated without the prior approval of the Secretary of Agriculture nor may any action be taken to enforce any unapproved regulation. This unmistakeable requirement is set forth in clear-cut language in Sections 3(e) and 3(f) of the Act (50 U.S.C.A. Appx. Secs. 903(e) and (f)):

> "(e) *Notwithstanding any other provision of this or any other law,* no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 (investigations) and section 205 (a) and (b) (injunctions and criminal prosecutions) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.
>
> (f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

These sections clearly lay down the requirement that no price ceilings on agricultural commodities can be promulgated or effectuated *without the prior approval of the Secretary of Agriculture,* nor can any such non-approved regulation be enforced in criminal proceedings. It is conceded by the Government that Maximum Price Regulation No. 271 on which the instant criminal proceedings are based was not promulgated with the prior approval of the Secretary of Agriculture (R. 14). Such a regulation, it is submitted, is not merely invalid but never became effectual and is therefore void. That regulation has no

more force and effect than a bill passed by Congress which was never signed by the President. Congress, in no uncertain terms, has stated that "Notwithstanding any other provision of this OR ANY OTHER LAW, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture." Where, as here, the Secretary of Agriculture has not approved the regulation, the regulation, under Congressional requirements is but a scrap of paper having no more legal or binding effect than a private utterance by the Administrator.

The requirement of approval by the Secretary of Agriculture was not inserted in the Act by happenstance or inadvertence. It was written into the Act after debate and with the clearest of intent that it was a *sine qua non* to the effectual promulgation of any agricultural commodity regulation. The Congressional Record is replete with evidence of this in the debates prior to the passage of the Act. We cite the Court's attention to but a few examples (Congressional Record, Vol. 88, pt. 1, pp. 665-67; Report to the House on the Emergency Price Control Act, January 26, 1942):

> "Mr. Steagall: The conferees accepted the so-called Bankhead Amendment which provides that any action by the Administrator relating to agricultural commodities shall first be approved by the Secretary of Agriculture. Under the law, the Secretary of Agriculture has been directed to offer inducements and rewards to accomplish increased production of farm commodities essential to the Nation's defense program. To authorize some other agency or authority to nullify such action on the part of the Secretary of Agriculture it seemed to us, would have been inconsistent and very unwise, so that provision of the Senate Bill was accepted
> • • •"

"Mr. O'Connor: Does the report in respect to the power given to the Secretary of Agriculture give him the last word in fixing the price on farm commodities?

"Mr. Steagall: The Gentleman does not quite express the provisions of the bill. He is given, not the last, but the first word. The provision is that no action with respect to agricultural commodities may be made effective by the Price Administrator without the prior approval of the Secretary of Agriculture.

"Mr. O'Connor: Then he has veto power. Is that correct?

"Mr. Steagall: Well, it might be so called * * *."

In the debates in the Senate, it was likewise brought out with great clarity and precision that no action with respect to agricultural commodities could be made effectual nor regulations promulgated without the prior approval of the Secretary of Agriculture. From the voluminous statements in the Senate to this effect, we cite the following examples (Congressional Record, Vol. 88, pt. 1, p. 696; Debate in the Senate on the Conference Report on the Price Control Bill, January 27, 1942):

"Mr. Austin: I should like to have the views of the learned Senator from Michigan about subsection (f) of Sec. 3 * * *:

'No provisions of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purpose of this Section. * * *'

"Mr. Brown: * * * The Secretary of Agriculture is charged with increasing production and I think it is entirely proper that he should be consulted and his determination relative to what prices are necessary in order to bring about a proper and sufficient production should be a potent factor in the make-up of the price of any commodity. The

> Bankhead Amendment certainly assures him a voice. It also gives him a veto power. I should have preferred a single plenary authority in one price administrator. The Senate thought otherwise. * * * I am satisfied that the Price Administrator and the Secretary of Agriculture will have no great difficulty in getting together under the standards of the bill and giving to the Country, consumers and producers alike, a fair price determination. * * *"

pp. 716-17:

> "Mr. LaFollette: By a decisive margin, the Senate wrote into the price control bill several provisions to protect the farmer * * * the wisest and safest policy for the farmers and the country in the long run is to give the Department of Agriculture the closely related powers to fix prices and to influence production * * *."

Any further demonstration of the Congressional intent underlying Section 3(e) of the Price Control Act would be but to pile Ossa upon Pelion. Congress advisedly and with great particularity provided, and intended to provide, that Regulations governing agricultural commodities would not become effectual without the approval of the Secretary of Agriculture and that no enforcement proceedings, criminal or otherwise, could be brought on a "regulation" not so approved. The regulation in the instant case, the Government concedes, was not approved by the Secretary of Agriculture (R. 14). It is a required sequitur that in the instant proceedings, there was no "regulation" on which the information could be based and in fact, the Act, itself, prohibited the proceedings. It is on this basis that Petitioner respectfully submits that his conviction and sentence be reversed and the proceedings dismissed.

The Courts have given credence to this statutory requirement. In the case of *Bowles, Price Administrator, v.*

Strickland (D.C. Ga. 1944), 55 Fed. Supp. 132, an action for treble damages was brought by the Price Administrator for the sale of agricultural commodities by a defendant in excess of the ceiling prices as provided in Maximum Price Regulation 291. In that case, it appeared that that Regulation was approved by the Secretary of Agriculture, but the Court dismissed the suit on the ground that, in cases of suits for treble damages, not only must the Secretary of Agriculture approve of the Price Regulation, but he must approve of the bringing of the particular suit for treble damages. In the course of its opinion, the Court held:

> "This is a suit by the Price Administrator for treble damages under U. S. C. A., Title 50, Appendix, sec. 925 (e), for alleged violation of MPR 291. Defendant moves to dismiss on the ground that the action was taken 'without the prior approval of the Secretary of Agriculture,' as required by Section 903 (e).
>
> Section 903 (e) provides that no action shall be taken by the Administrator without the prior approval of the Secretary, except that he may proceed for injunction or by criminal prosecution, if the price has been previously approved by the Secretary.
>
> *The words 'if the price has been previously approved by the Secretary' seem to indicate that the prices fixed by the Administrator are to be approved by the Secretary.* Section 903 does require the Secretary to determine and publish certain prices and prohibits the Administrator from fixing maximum prices below the highest determined by the Secretary. The Administrator apparently construes Section 903 as requiring approval of his prices by the Secretary. *In fact, MPR 291 recites that, 'The Price Administrator has consulted with the Secre-*

tary of Agriculture and has obtained his approval for the agricultural commodities covered herein.'

There are, therefore, two approvals to be made by the Secretary, an approval of the prices fixed by the Administrator and an approval, under Section 903 (e), of suits (for treble damages) to be filed.

The approval of the prices fixed by MPR 291, it is conceded, was obtained. It is conceded also that there was no prior approval of this action by the Secretary unless the fact that the Secretary approved MPR 291 amounts to approval of the action.

The Administrator contends:

1. That no approval is necessary.

2. That approval was obtained when the Secretary approved MPR 291.

In enacting the Emergency Price Control Act, Congress gave direct and special attention to agricultural products. In connection with the general price fixing authority, contained in Section 902, Congress in subsection (f) thereof, specifically provided that no power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 903, which deals with agricultural commodities. By way of emphasis, Congress in 903 (f) said that no provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section." (Our italics.)

Likewise, in the case of *Brown v. Banana Distributors of Connecticut* (D.C. Conn. 1943), 52 Fed. Supp. 804, a similar interpretation was given to the requirements of Section 3(e) of the Act. In that case, civil proceedings were brought against the Defendant by the Price Administrator for violations of the price ceilings imposed on imported bananas under the Price Control Act. A motion to dismiss grounded on the objection that the Regulation

was not approved by the Secretary of Agriculture was denied because it was held that the requirement of approval did not apply to *imported* agricultural commodities, the Court holding, however, as follows:

> "Defendants' motion to dismiss is founded upon two claims: First—that under the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, Sec. 901, *et seq.*, regulations concerning bananas are invalid unless approved by the Secretary of Agriculture.
>
> This raises the question of the meaning of the term 'any agricultural commodity' in Section 3 (e) Title 1 of the Act, 50 U. S. C. A. Appendix, Sec. 903 (e). *It is the contention of the Government that this language in the act was intended to refer only to agricultural commodities produced within the United States,* and that bananas, being an imported commodity, were not intended to be covered by the act's requirement of prior approval by the Secretary of Agriculture, of action with respect to any agricultural commodity. This interpretation has been followed by the Secretary of Agriculture, pursuant to Opinion No. 4434, dated August 22, 1942, by the Solicitor of the Department, as well as by the Office of Price Administration. A reading of Section 3 (e) alone would give the meaning contended for by the defendants. *However,* * * * *in view of the fact that Subsection (e) was added in the senate in an effort to give the Secretary of Agriculture control over prices received by the American farmer,* I am constrained to agree with the construction contended for by the plaintiff and hold that prior approval by the Secretary of Agriculture is not necessary as a prerequisite to the validity of orders by the Price Administrator concerning the maximum prices of imported agricultural commodities under the Price Control Act of 1942." (Our italics.)

Thus, it appears that the Price Administrator, the Secretary of Agriculture and the Courts have all recognized the Congressional requirement that a "Price Regulation" of Agricultural commodities cannot be effectuated or enforced without the approval of the Secretary of Agriculture. It is submitted that the absence of such an approval of the instant "Regulation" No. 271 requires the dismissal of the instant proceeding based on that "Regulation."

II.

THE APPROVAL OF "REGULATION" 271 BY THE WAR FOOD ADMINISTRATION DOES NOT FULFILL THE STATUTORY REQUIREMENT OF APPROVAL BY THE SECRETARY OF AGRICULTURE

The instant "regulation" No. 271, although it concededly was not approved by the Secretary of Agriculture, was approved by the War Food Administrator (8 Fed. Register p. 7017). The Government will doubtless contend, as it did in the trial court, that the approval of the "regulation" in question by the War Food Administrator fulfilled the statutory requirements of approval by the Secretary of Agriculture. We submit that the Congressional mandate cannot be satisfied by this ersatz approval.

The attempted substitution of the approval by the War Food Administrator for the approval by the Secretary of Agriculture came about in the following way. Even during the debate on the Price Control Act of 1942, it appeared that the Administration had objections to the requirement that regulations on agricultural commodities must be approved by the Secretary of Agriculture. During the debate in the Senate, the following statement was

made (Vol. 88 Cong. Rec. Pt. 1, pages 109-110—Jan. 8, 1942):

> "Mr. Barkley: In view of the fact that an amendment is to be offered by the Senator from Alabama (Mr. Bankhead) transferring to the Secretary of Agriculture power to fix prices with respect to agricultural products * * * I desire to have read * * * a communication from the President of the United States * * *:
>
> 'The White House
> Washington, January 7, 1942
> Hon. Alben W. Barkley,
> Washington, D. C.
>
> I appreciate the speed with which the Senate Committee is handling the price control bill * * *.
>
> But I am somewhat * * * disturbed at the suggestion that control over agricultural commodities be separated from all other articles and vested in the Department of Agriculture.
>
> I strongly hope that no division of control will be made. The whole price structure is linked together. * * *
>
> Franklin D. Roosevelt.' "

The requirement for prior approval by the Secretary of Agriculture was, nonetheless, made part of the Act. Thereafter, it appeared that difficulties between the Price Administrator and the Secretary of Agriculture arose, as reflected by this subsequent statement in Congress (Vol. 88, Pt. 8, Cong. Rec., page A808—March 3, 1942):

> "Honorable Ross Rizley: Mr. Speaker, confusion and lack of co-ordination on the part of those in responsible positions keep the public mind in a constant state of apprehension and uncertainty.
>
> Because of the apparent disagreements and lack of understanding between the Price Administrator,

> Leon Henderson, and Secretary of Agriculture Wickard, frankly, as a member of the Committee on Agriculture, I am confused as to just what the food program and prices to be fixed on agricultural products really is * * * (Referring to newspaper article by the A.P.)—'Secretary of Agriculture Wickard said: "I think Mr. Henderson has been a very busy man and he has had a lot of things placed on him, but I do not think he feels he is necessarily bound to ask for my approval on the actions he is taking, and I do not know when he asks me a question whether that is asking for an approval * * *. Mr. Henderson has said he wants to work with us very closely but he has never said there has to be an agreement. He makes the decisions.' When Congress passed the price control bill it inserted a provision conferring on Mr. Wickard the power to disapprove farm price ceilings.' "

Apparently, as a result of the insistence of the Secretary of Agriculture on his statutory right, the President, by Executive Order No. 9250, promulgated on October 3, 1942, (50 U.S.C.A. Appx. Sec. 901) provided that henceforth price ceilings on agricultural commodities should be established jointly by the Office of Price Administration and the Secretary of Agriculture and in the event that they could not agree that the same should be determined by the Director of Economic Stabilization. Subsequently, on April 8, 1943, the President, by Executive Order No. 9328 (50 U.S.C.A., Appx. § 901) transferred the duties of the Secretary of Agriculture in this respect to the Food Administrator, and on April 19, 1943, by Executive Order No. 9334 (50 U.S.C.A., Appx. p. 252) transferred the said powers from the Food Administrator to the War Food Administrator.

The transfer of the powers and duties of the Secretary of Agriculture under the Emergency Price Control Act

was made by the President under the alleged authority given to him under the First War Powers Act (50 U.S.C.A. Appx. Secs. 601-622). This Act, passed on December 18, 1941, antedated the Emergency Price Control Act which was enacted on January 30, 1942, and Congress obviously had this prior Act in mind when it enacted the Emergency Price Control Act. Congress laid down the requirement in Section 3(e) of the Emergency Price Control Act, that, despite any provisions in any other law (including the War Powers Act), no action could be taken *"by the Administrator or any other person"* under the Emergency Price Control Act on agriculture commodities without the prior approval of the Secretary of Agriculture. The Price Control Act, in a section dealing with the transfer of powers of other agencies to the Price Administrator, further provided that, despite the provisions of any other law (including the War Powers Act) no power granted to the Secretary of Agriculture could be transferred to the Price Administrator (50 U.S.C.A. Appx. Sec. 921(b)). Consequently, Congress clearly and definitely enunciated that, although the President might have powers generally to transfer duties among the executive branches of the Government under the First War Powers Act, when it came to the setting of price cealings on *agricultural commodities* under the Emergency Price Control Act, that was one situation where the power granted to the Secretary of Agriculture was nontransferable and exclusive.

The net result of these Executive Orders was that, despite the Congressional requirements, the President has attempted to transfer the exclusive rights of the Secretary of Agriculture to the Office of Price Administration and the War Food Administrator jointly. It is submitted that the President's orders were a nullity and could not override the Congressional requirement of approval by the Secretary of Agriculture. The Presidential orders not

only violated the Congressional requirement contained in Section 3(e) of the Act requiring exclusive approval by the Secretary of Agriculture, but also, violates Section 1(b), Title II of the Act (50 U.S.C.A. Appx. Sec. 921(b)), which prohibits any transfer of powers of the Secretary of Agriculture to the Office of Price Administration. Thus, Price Regulation No. 271, promulgated without the approval of the Secretary of Agriculture, never became law under the Congressional requirements and the substituted approval of the War Food Administrator could not give life to this unborn regulation.

Where, by law, Congress has ordered that certain acts can only be done by the Secretary of Agriculture, the President is powerless to transfer those duties to any other person or interfere in the performance of such duties. This fundamental principle of our constitutional form of Government was first and finally determined in the case of *Marbury v. Madison,* 2 L. Ed. 60, by Chief Justice Marshall. In *Marbury v. Madison,* it appeared that President Adams had made certain appointments to the judiciary and had actually signed the commissions therefor. Thomas Jefferson thereupon took office as President and instructed the Secretary of State to refuse to deliver the commissions to the appointees. Marbury, one of the appointees, brought mandamus proceedings against the Secretary of State to force the delivery of the commission. The United States Supreme Court held that the President was powerless to interfere with the duties of any of the executive branches of the Government as ordained for them by act of Congress or the Constitution. Chief Justice Marshall, in his memorable opinion, held flatly that the President could not interfere in any way with the duties of the Secretary of State and that his acts in that regard were null and void. The Chief Justice held:

"(After discussing the duties of Secretary of State as prescribed by statute) * * * The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office, the President cannot take from his custody the seal of the United States, nor prevent him from recording and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. *The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are intrusted, and he alone is answerable for their due performance.* The Secretary of State, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. * * * (2 L. Ed. 62.)

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

> This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose. * * * (2 L. Ed. 67.)
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> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.
>
> The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." (2 L. Ed. 70.) (Our italics.)

Here is a specific duty and exclusive right vested in the Secretary of Agriculture by Congressional Act, that no regulations could be effectuated by the Office of Price Administration without his sanction. The effort of the President to take that exclusive right and duty away from

the Secretary of Agriculture and confer it on others was specifically prohibited by Congress and by the holding in *Marbury v. Madison, supra.* The emergency requirements for price legislation was met by the Price Control Act and Congress clearly enunciated the manner of fixing prices. There could be no emergency upon an emergency warranting the total disregard of the statutory requirements of that Act. To determine otherwise would be to hold that all enactments of Congress during war-time have no more effect than if they were enscrivened on ice.

Respondent will undoubtedly contend that, because Congress subsequently appropriated $25,000,000 under the Agricultural Appropriation Act of 1944 (57 Stat. 392, p. 415), to enable the War Food Administrator to carry out its functions, and because the War Food Administrator had attempted to substitute its approval on agricultural price ceilings for that of the Secretary of Agriculture, therefore the Appropriation Act, in effect, constituted an implied repeal of Section 3(e) of the Price Control Act.

It is submitted that no such implied repeal can be warranted. Section 3(e) of the Price Control Act is clear and unambiguous. It is contrary to all rules of statutory construction that such an Act can be impliedly repealed by an Appropriation Act which does not, either by its terms nor by intent, override the Price Control Act.

Moreover, it is clear that the intent of Congress, in providing funds for the War Food Administrator, was merely to enable the Administrator to function but was not a ratification of any powers it might have illegally assumed. When the President created the War Food Administration, he imposed upon it a multitude of duties including the power to approve agricultural commodity prices. For example, there was transferred to the War Food Administration the following agencies: Food Pro-

duction Administration; Food Distribution Administration; Commodity Credit Corporation; Extension Service; Office of Labor; Office of Materials and Facilities; Office of Transportation; Office of War Board Services; Farm Security Administration; Agricultural Adjustment Agency; Soil Conservation Service; and a multitude of other duties and agencies too numerous to mention. See CCH Fed. Administrative Procedure pp. 60, 291, *et seq.* Among the literally hundreds of duties imposed upon the War Food Administrator by the President was the power contested by us in this case, to approve agricultural commodity prices. The fact that Congress appropriated the funds for the War Food Administrator to carry out the multitude of duties imposed upon him, cannot be held to constitute an approval by Congress of a function assumed by him in direct violation of a Congressional Act.

Congress, in the instant case, very clearly and specifically intended that the Secretary of Agriculture and only the Secretary of Agriculture had the power to approve farm price ceilings. In view of this clear-cut restriction imposed by Congress, the fact that it appropriated money for the War Food Administrator, cannot be deemed to override its intent express in the Price Control Act. By its appropriation, Congress may have given the War Food Administrator life to do many things, but not license to do what it had previously forbidden to any one but the Secretary of Agriculture.

The approval of "Regulation" 271 by the War Food Administrator is no substitute for the exclusive approval by the Secretary of Agriculture without which, by Congressional fiat, this "Regulation" could not become law. By no such legerdemain should the unmistakable Congressional decree be held for naught.

III.

THE PRICE CONTROL ACT DOES NOT DEPRIVE THE COURT OF THE JURISDICTION TO DETERMINE THAT THE "REGULATION" WAS NOT VALIDLY PROMULGATED AND CANNOT BE ENFORCED

The Government will undoubtedly contend that, even assuming that Petitioner's contentions as to the "Regulation" are true, those contentions cannot be made in these proceedings because of the provisions of Section 204 (d) of the Price Control Act. The Price Control Act, in Section 203 (50 U.S.C.A., Appx. Sec. 923) provides for the manner of objecting to price regulations, commencing with a "protest" within sixty days after the issuance of the regulation and, through successive steps, to the Emergecy Court of Appeals and the United States Supreme Court. Section 204(d) of the Act provides, in pertinent part, as follows (50 U.S.C.A., Appx. Sec. 924(d)):

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The Circuit Court of Appeals and the District Court, in the instant case, determined that they could not consider petitioner's contentions because of the limitations of Section 204(d) of the Act (R. 13-18, 32-36). It is submitted that Section 204(d) does not prohibit the consideration of the particular contentions made by petitioner. The section provides that the Courts should not have jurisdiction or power to consider the validity of any Regulation "issued under Section 2" of the Act. It is clear that the instant Regulation No. 271 was never properly "issued" under Section 2 of the Act. Section 2 of the Act (50 U.S.C.A., Appx. Sec. 902) provides for the power of the Price Administrator to issue price regulations and in Section 2(f) provides that "no power conferred by this Section shall be construed to authorize any action contrary to the provisions of Section 3 • • •." And, as we have seen, Section 3 provides that Price Regulations must be approved by the Secretary of Agriculture to become effectual. Consequently, it is petitioner's contention that there was never any proper promulgation or "issuance" of the Regulation under the Act. This contention is not, we submit, barred by Section 204 (d). Section 204(d) does not prohibit any defendant from a showing that a purported Regulation has not been legally promulgated and does not exist as a matter of law. Such a "Regulation" is the instant Maximum Price Regulation No. 271.

Section 204(d) was not intended to foreclose such contentions. The prohibition was intended to apply where the alleged invalidity involves questions of fact as to whether, for example, the price fixed is unreasonably low, rather than to a regulation void on its face as a matter of law. The intent of Section 204(d) was to prevent conflicting decisions of courts over the country on the validity of regulations based on factual issues, with the detrimental

effect on the effectiveness of a unified price control. Attacks of this kind Congress decreed should be limited to the protest precedures, wherein protest must be made within 60 days after issuance of the Regulation, and successive steps taken through to the Emergency Court of Appeals and then to the United States Supreme Court (50 U.S.C.A., Appx., Sec. 923-4). In any event, the 60 day period for protest had expired in the instant case long before the information was filed against the defendant in the instant case on September 14, 1943 (See Maximum Price Regulation, No. 271, 8 Fed. Reg., p. 7017, May 27, 1943).

Where a regulation never became law, as is petitioner's contention, it was not the intent of the Act to require a defendant to be restricted to the protest procedure. This is brought out in the only case yet to come before the Supreme Court on the effect of Section 204(d) in criminal cases. In *Yakus v. U. S.*, 321 U. S. 414, 88 L. Ed. 834 (1943) defendant, in criminal proceedings for sales in violation of the Price Control Act, sought to establish that the Regulation involved was invalid because the prices fixed were unduly low and did not conform to the standards prescribed. The U. S. Supreme Court held, with three Justices dissenting, that defendants could not raise such attacks on the validity of a Regulation, holding, however:

> "We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation under Secs. 4 (a) and 205 (b). Section 203 (a) sets up a procedure by which 'any person subject to any provision of a regulation or order' may within 60 days after it is issued 'file a

protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.' * * * In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

Section 204 (c) creates a court to be known as the Emergency Court of Appeals consisting of United States district or circuit judges designated by the Chief Justice of the United States: Section 204 (a) authorizes any person aggrieved by the denial or partial denial of his protest to file a complaint with the Emergency Court of Appeals, within thirty days after the denial, praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part. (Page 662.)

* * * * *

"Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity. * * *

"* * * it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the

confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. (Pages 664-5) * * *

"*We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face.* Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. *There is no contention that the present regulation is void on its face,* petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so." (Page 672.) (Our italics.)

Thus, even the majority opinion in the *Yakus* case recognizes that the attack on a regulation because it is void on its face, is not foreclosed by that decision. Moreover, the Court does not, of course, even intimate that it would foreclose such a contention as is here made, that no regulation was ever issued pursuant to the Act.

Moreover, viewed in another light, this Court does not have to consider the validity or invalidity of the "Regulation" in order to dismiss the instant proceedings, for Section 3(e) of the Act, in effect, provides that no criminal or other actions may be brought on regulations which have not been approved by the Secretary of Agriculture (50 U.S.C.A., Appx. Sec. 903(e)). Assuming that this Court is foreclosed from even determining that a regulation is "void on its face," that is not the determination

which is required to be made here. A finding by this Court that the Act required approval of the instant Regulation by the Secretary of Agriculture and that no such approval was given, requires this Court, under Sec. 3(e) of the Act, to refuse to enforce such a "regulation," and the validity or invalidity of the regulation is not in issue.

We are not here contesting the validity of the Regulation as to its reasonableness, but attacking the very promulgation of the regulation on the ground that no regulation has been enacted and that "Regulation" No. 271 is not law. Certainly, if the District Attorney had commenced this suit based on a Regulation that was issued by the janitor in the offices of the Price Administrator, but in the name of the Price Administrator, we should be free here to attack the validity of the Regulation despite the provisions in Section 204(d) above. Section 204(d) does not prohibit any defendant from a showing that a purported Regulation does not exist as a matter of law. Such a regulation is Maximum Price Regulation No. 271.

The Act under which the petitioner was prosecuted, while it conferred emergency powers necessitated by the existence of war, provided that before regulations governing agricultural commodities could become effectual and enforceable they must be approved by the Secretary of Agriculture. That statutory requirements was not met in the instant "regulation." It cannot be that the law speaks too softly to be heard in the noise of war.

CONCLUSION

Petitioner respectfully submits that the decisions of the Court of Appeals for the Sixth Circuit and of the District Court should be reversed, the judgment and sentence entered be set aside and the cause dismissed.

Respectfully submitted,

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